

The Special Master's Role as Mediator: Experiences in the 50th State

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I. INTRODUCTION

The purpose of this Article is to identify the role, power and responsibilities of the special master for mediation. It was compiled while on an externship with the Hawaii State Judiciary Program on Alternative Dispute Resolution (ADR).¹ Special masters are increasingly being used for settlement purposes,² a role that often calls for the master to act as a mediator. Special masters are used on the federal level to help manage and/or settle complex cases³ such as asbestos and Agent Orange litigation.⁴ Because the special master for mediation is a relatively new use of the special master, the scope of that role has not been fully explored and guidelines for their authority and power within the judicial system have not been set out.

This Article surveys recent use of special masters for mediation. Judges and special masters for mediation were interviewed to identify the scope of power that a special master needs to effectively mediate. A standard of authority to guide special masters for mediation is established by using this information as a foundation. These guidelines focus on the level of communication between the master and the court, as well as the scope of the special master's role, powers and responsibilities.

Part II of this Article defines the settlement role of a judge, magistrate and special master, and discusses the emerging and potential role of the special master as mediator. This Article also briefly reviews how these roles are controlled by federal and state rules, statutes and the United States Constitution. Part III identifies objectives and purposes of the special master for settlement or the "court appointed mediator" [hereinafter referred to as "special master for mediation" or "settlement master"]. Part IV discusses findings from legal precedents and interviews. In conclusion, Part V

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1. The Hawaii State Judiciary's Program on Alternative Dispute Resolution was established to encourage the use of ADR in the state courts.

2. Barrett, *Harried Judges Rely on 'Special Masters' to Settle Tough Suits*, Wall St. J., Nov. 5, 1987, at 1, col. 4.

3. FED. R. CIV. P. 53.

4. See Barrett, *supra* note 2; Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 342 (1986).

summarizes the findings and establishes a standard of authority to guide those who adopt the role of special master for mediation.

II. ESTABLISHED ROLES IN SETTLEMENT

A. *Judges and Magistrates*

1. *The Judge's Role in Settlement.*

In the normal course of litigation, the pretrial management process is often when settlement is first discussed. If the judge happens to be managerially inclined, settlement discussions are more likely to occur.⁵ At the pretrial stage, the judge may be able to determine which disputes are resolvable by a method other than trial.⁶ Carrie Menkel-Meadow points out that those who conduct pretrial conferences must decide at the start whether their goal should be efficiency, case management, or better solutions to the dispute.⁷ A judge has four major resources available to promote settlement: (1) control of the disposition of certain issues; (2) knowledge about other matters relevant to case settlement; (3) a reputation for fairness; and (4) control over inducements and administrative supports.⁸ These factors, although used to varying degrees and at different times in a dispute, indicate that the judge has the potential to be a key player in facilitating settlement, and explains "why the decision to litigate or to settle is often more properly viewed as a bargaining process involving three parties rather than two."⁹

Ultimately, the role a judge takes in fostering settlement depends upon his or her personality type -- whether he tends to be passive or managerial. The managerial judge, by nature, tends to actively pursue settlement if he or she deems it appropriate.¹⁰ Professor Judith Resnik believes that the judge's role

5. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1364, 1370 (1983-84).

6. Tractenberg, *Court-Appointed Mediators or Special Masters: A Commentary*, 12 SETON HALL LEGIS. J. 81, 84, 86 (1988).

7. Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?* 21 TRIAL 24, 29 (1985).

8. Schuck, *supra* note 4, at 350.

9. *Id.* at 351.

10. Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 444, 445 (1982). See also Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).

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demands a deliberated and reasoned explanation for decisions.¹¹ Judges must rule with disinterest and disengagement from both the parties and the dispute, without concern for specific constituencies.¹² Her concern is that the judge, without being required to air reasons in a public forum, may manipulate the results of a case during settlement.¹³

The American Bar Association (ABA) supports the traditional responsibility of the court to control the pace of litigation.¹⁴ It also emphasizes that such judicial commitment includes the responsibility to develop modern management techniques.¹⁵ These techniques incorporate the judge's need to deal with large case demands and inherently call for efficient case management.

2. *The Magistrate's Role in Settlement.*

The enactment of the Magistrates Act¹⁶ granted judges of each district court the power to appoint magistrates to perform non-adjudicatory tasks and "additional duties as are not inconsistent with the Constitution and laws of the United States."¹⁷ A magistrate's duties include, but are not restricted to,¹⁸ "serving as a special master, rendering assistance to a district judge in pretrial or discovery proceedings, and conducting preliminary review of applications for post-trial relief."¹⁹

Courts are usually more lenient in allowing magistrates to serve as special masters than they are in allowing attorneys or others to fill the role. This is partly because magistrates are compensated by Congress, thus, theoretically, in performing their duties there is no interference from other occupational interests. The problems of maintaining confidence in the judicial process is also considered less severe with a professional magistrate than with an ad hoc

11. Resnik, *supra* note 10, at 445.

12. *Id.*

13. *Id.* at 426-28, 431.

14. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 259-60 (1985).

15. *Id.*

16. 28 U.S.C. § 631 (1970).

17. *Id.* at § 636(b).

18. *Id.*

19. Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779, 797 (1975).

aster²⁰ because the magistrate has a closer connection to the court system and serves as administrative support for the judge.

B. *The Master's Traditional Role in Settlement*

Two main types of masters were established -- the standing master and the special master. A standing master and a special master both serve similar purposes, but are administratively different. A standing master is employed by the court on a regular basis. A special master, however, can be called upon by the court, or can be selected by parties to the litigation. Special masters are likely to have more diverse roles than standing masters because their appointments typically involve a broader range of issues than those given to the standing master.²¹ Special masters have been assigned to assist in areas such as institutional reform, implementation of judicial decrees, and discovery management. The term "standing master" is rarely used today, and no reference to it was found in this author's research.

The master has traditionally been used as a fact finder. For example, masters have commonly been appointed to resolve problems of accounting in cases where these issues are particularly complex. They have also been appointed to help manage discovery and complex litigation cases. Essentially their role has been geared to compiling clear, concise information for the judge to use in the trial of a particular case. Settlement has not been the primary goal of masters in the past, but their activities may have inherently served to assist the judge in pretrial settlement.

1. *Federal Rule of Civil Procedure 53: Masters.*

The use of masters in the United States originated from their use in the English court system.²² The Federal Rules of Civil Procedure (F.R.C.P.), and those state courts that have adopted similar rules, provide for the designation of masters.²³ Their duties upon appointment are to be specified in the order of reference as outlined in F.R.C.P. 53(b).²⁴ F.R.C.P. 53(a) explains that the word "'master' includes a referee, an auditor, an examiner,

20. *Id.* at 799-800.

21. See BLACK'S LAW DICTIONARY 879 (5th ed. 1979).

22. See, e.g., Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1072-79 (1975); Greaney, *Trials Before Masters: A Procedural and Substantive Primer for the Practicing Lawyer*, 63 MASS. L. REV. 195 (1978).

23. FED. R. CIV. P. 53.

24. Note that Hawaii did not incorporate FED. R. CIV. P. 53 into its rules of civil procedure.

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a commissioner; and an assessor." Referees are appointed by the court to assist in the court's handling of a case and to take testimony from the parties and report back to the court. "Auditors" focus on accounting, "examiners" on testimony, "commissioners" on administration of the laws, and "assessors" on the value of property.²⁵ The master is not required to be an attorney; however, one can assume that the court will appoint a master with the expertise needed to assist with a case.

According to F.R.C.P. 53, the master's primary duty is to assist the court by serving a specific role within a particular case. By leaving the order of reference open to the court's discretion, F.R.C.P. 53 increases the potential range of activities the court may give to the master:

The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.²⁶

This language clearly states that, in delineating the master's power, the order of reference may (or may not) specify or limit the master's powers.²⁷ If the court chooses not to specifically limit the master's power, many decisions will be made at the master's discretion. A broad definition of the master's power might increase the master's possible scope of activities beyond those identified in F.R.C.P. 53, leaving the door open for the master to serve a more active role in settlement.

2. Federal Rule of Civil Procedure 16: Pretrial Conferences; Scheduling; Management.

Another federal rule impacting the use of special masters is F.R.C.P. 16, which directs parties to appear before a judge for a conference prior to trial.²⁸ Included among the purposes of F.R.C.P. 16(a) are early management and control of a case, improved trial preparation, and discouraging wasteful pretrial activities. F.R.C.P. 16(c) was developed to encourage coordinated

25. BLACK'S LAW DICTIONARY 120, 501, 246, 107 (5th ed. 1979).

26. FED. R. CIV. P. 53.

27. See *Webster Eisenlohr v. Kalodner*, 145 F.2d 316, 319 (3d Cir. 1944). See generally *Tractenberg*, *supra* note 6.

28. Hawaii has largely incorporated FED. R. CIV. P. 16 into HAW. R. CIV. P. 16.

planning and management of dispute settlement.²⁹ Among the subjects discussed in F.R.C.P. 16 are:

The advisability of referring matters to a magistrate or master [F.R.C.P. 16(c)(6)]; the possibility of settlement or the use of extrajudicial procedures to resolve the dispute [F.R.C.P. 16(c)(7)]; . . . and the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems [F.R.C.P. 16(c)(10)].³⁰

F.R.C.P. 16(c)(7) specifically promotes the use of methods other than the courthouse as a means of dispute settlement, and provides judges the statutory framework in which to assume a more active role in managing their dockets.³¹ It may also serve to encourage the parties to streamline litigation by narrowing issues and establishing additional procedures to facilitate a less costly resolution to the dispute.³²

F.R.C.P. 16, which the Hawaii Rule is modeled after, legitimizes innovative pretrial and settlement strategies developed and implemented by certain judges in the mid-sixties.³³ Although the Hawaii Rule refers to the use of a master, it does not provide information on the master's role upon appointment. Theoretically, this would be provided through F.R.C.P. 53(b), reference to a master, for which there is no state counterpart.³⁴

3. *Hawaii Statutes and Rules.*

The Hawaii Rules of Civil Procedure (H.R.C.P.) do not have a F.R.C.P. 53 counterpart that controls the appointment and use of masters.

a. *Hawaii Revised Statutes (H.R.S.) Section 635-14.*

However, Hawaii Revised Statutes Section 635-14 states that "[i]n matters within the jurisdiction of circuit courts as set forth in sections 603-21.6 and 603-21.7 and in civil actions not within such jurisdiction if so provided by statute or rule of court, a reference to a master may be

29. FED. R. CIV. P. 16(c) advisory committee's note, 1983 amendment.

30. FED. R. CIV. P. 16(c)(6), (7) and (10).

31. CPR, *In-Court Settlement Devices, Alternatives*, Special Issue 5 (1985).

32. *Id.*

33. *Id.*

34. References are discussed in Part III, *infra*.

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ordered."³⁵ This statute provides no specific limits on the scope of the reference to a master. Inherent restrictions in the statute would be those that exist in the state and federal constitutions, for example the right of due process of law specified in the fourteenth amendment of the United States Constitution. In addition, the rules of the various state courts, a discussion of which follows, mention the role and powers of a special master.³⁶

b. *Hawaii Rules of Civil Procedure 16: Pretrial Procedure; Formulating Issues.*

H.R.C.P. 16 is the state counterpart of F.R.C.P. 16. H.R.C.P. 16 provides that the court, in its discretion, may order a conference to consider (among other things) the use of a master to identify findings to be used as evidence at trial.³⁷ Like its federal counterpart, H.R.C.P. also allows other matters that will help in disposing of the case to be considered.³⁸ The large degree of judicial discretion granted in H.R.S. 635-14 is, if anything, increased by H.R.C.P. 16 because it allows the judge to grant a master the level of power suitable to the judge's needs.

c. *Family Court.*

Rule 66 of the Hawaii Rules of Family Court³⁹ specifically allows for the appointment of masters by Family Court judges. The Rule states that the court may refer issues to a master, where appropriate, "for findings to be used as evidence or to assist in the resolution of issues."⁴⁰ The special master, in this case, serves as a settlement master or mediator for the court. There is no order of reference controlling the function of these mediators. However, the Hawaii State Judiciary Program on ADR has established standards for public and private mediators that could be applied if no other rules are adopted.⁴¹

35. HAW. REV. STAT. § 635-14 (1972).

36. See, e.g., HAW. FAM. CF. R. 66, HAW. LAND CT. R. 20-22.

37. HAW. R. CIV. P. 16(5).

38. *Id.*

39. See HAW. R. CIV. P. 1, 2, 3, 4, 6, as amended, July 1, 1982.

40. HAW. R. FAM. CT. 66.

41. PROGRAM ON ALTERNATIVE DISPUTE RESOLUTION, THE HAWAII STATE JUDICIARY, STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAII (1986) [hereinafter STANDARDS]. The standards were endorsed by the Hawaii Supreme Court on April 22, 1986.

The Family Court Rule is one of several where the master's settlement role is clear. Special masters and mediators were appointed to assist with settlement during the Family Court's recent Divorce Status Conferences.⁴² The special masters' task was to try to settle the cases directed to them by the judge. Their role fell somewhere between that of mediator and arbitrator.⁴³ An order appointing the special masters to make findings and assist in the resolution of pending divorce actions was signed by the senior judge of the Family Court.⁴⁴ The judge personally instructed the special masters as to the details of their assignments. Complex cases, including those with more than one issue and property or financial matters, went to the special masters, while single issue, less complicated cases went to the mediators.

d. *Land Court.*

Rules 20, 21 and 22 of the Hawaii Land Court deal with the use of a master in land-related proceedings,⁴⁵ and provide direction for hearings and procedures before the master, as well as exceptions to the master's report. Rule 20 gives the master specific parameters in which he or she must function and allows for *ex parte* proceedings when respective parties do not attend negotiations after being duly notified. Rules 21 and 22 deal exclusively with the master's report and objections to the report. The master is to circulate a copy of the draft report to the parties and may use discretion in hearing suggested changes. Rule 21 specifies that exceptions to a master's report will be allowed with a special order from the court only if certain criteria are met. Exceptions are to be filed with the registrar and then must be argued. In this case, the master's role is partially specified in the court rules. However, the Land Court master is rarely used, and no masters have been appointed in the last six years.⁴⁶

42. Coordinated by First Circuit Court Judge Evelyn B. Lance, the mandatory divorce settlement conferences were held between April 4-14, 1988.

43. Personal observation, April 12, 1988.

44. Order Appointing Special Masters, Family Court, First Circuit Court, Hawaii, Mar. 16, 1988.

45. Order Adopting and Promulgating Rules of the Land Court; Rules and Regulations for Surveyors Licensed To Practice Before the Land Court. Granted authority by HAW. CONST. amend. V § 7 (1978, amended 1985).

46. Telephone interview with Ruppert Chun, Land Court Administrator, Honolulu, Hawaii (June 27, 1988).

C. *Mediators and Mediation*

A mediator is a third-party neutral that facilitates the settlement of disputes and usually intervenes at the consent of the disputing parties. The parties have primary decision-making authority; they decide if a mediator is acceptable to their needs, whether agreement will be reached, and if so, what the agreement will contain. Mediation emphasizes communication and problem-solving and depends upon procedural flexibility, fairness, full disclosure and confidentiality to function properly.⁴⁷

In comparing the functions of a mediator and an arbitrator, Cooley has defined the mediator as employing a creative process, while the arbitrator uses a more rational, technical mental process.⁴⁸ The role of mediator relies on instinctive reactions, intuition, interpersonal skills and the ability to perceive psychological and behavioral indicators, as well as logical and rational thinking, and is thus more difficult than the role of arbitrator. In judicial terms, Cooley compares the function of mediation to that of a settlement conference.⁴⁹

1. *Mediation Rules.*

Because flexibility is an important ingredient in successful mediation, establishing specific mediation rules is very difficult. Several states are in the process of establishing mediation rules or now have rules in place, including New Jersey, Florida, Washington and California.⁵⁰ As previously noted, the Hawaii State Judiciary has developed standards for public and private mediators.⁵¹

47. STANDARDS, *supra* note 41 at 1.

48. Cooley, *Arbitration vs. Mediation: It's Time to Settle the Differences*, 66 CHI. B. REC. 201 (1985).

49. *Id.* at 205.

50. The New Jersey Supreme Court Committee on Masters and Hearing Officers' Task Force on Dispute Resolution recently completed a report to the New Jersey Supreme Court discussing expanded, temporary and experimental use of masters (April 20, 1988); FLA. STAT. § 87-173 (1988), relating to mediation and arbitration, provides for court-ordered mediation, minimum standards for qualifications, and rules of professional conduct and training of mediators and arbitrators; WASH. ST. R. 39.1 allows for court-appointed mediators and specifies that during the mediation there is to be no communication with the judge and no mediation papers are to be filed with the court; CAL. MED. R. §§ 302-303 (draft 1988). *See also* Tractenberg, *supra* note 6.

51. STANDARDS, *supra* note 41.

a. *Rules Adopted by the Program on ADR.*

In Hawaii, mediation rules have been established by the Program on ADR, for its Public Disputes Project (PDP).⁵² The PDP is an experimental branch of the ADR Program. It was designed to incorporate mediators and special masters for mediation into the judicial system and to provide judges, attorneys and litigants a method by which they can use mediation to resolve disputes. The PDP rules were adopted from mediation rules established by the American Arbitration Association (AAA).⁵³ The need for these guidelines arose due to the structure of the PDP, an experimental project working within a legal framework. Guidelines are necessary for the PDP mediators so that they can organize their efforts and conduct mediations using a fairly standardized methodology. For the PDP, the rules provide a degree of accountability to the mediation process in order to help assess whether the process is successful.

Regarding the authority of a mediator,⁵⁴ the mediation rules state that the mediator is to help the parties "reach satisfactory resolution of their dispute," and does not have authority to impose a settlement on the parties.⁵⁵ Joint and separate meetings with the parties are authorized, as are oral and written recommendations for settlement. The mediator may obtain expert advice and can terminate the mediation at his or her discretion.⁵⁶

Privacy and confidentiality are also addressed by the rules. All mediation sessions are to be attended only by the parties and their representatives, with other persons permitted to attend only with permission of the parties and the consent of the mediator. The mediator must not divulge confidential information exposed by the parties or witnesses during the mediation process. The mediator also must not be compelled to divulge such information in an adversary proceeding or judicial forum.⁵⁷ The parties are required to

52. PUBLIC DISPUTES MEDIATION PROJECT MEDIATION RULES, HAWAII STATE JUDICIARY PROGRAM ON ALTERNATIVE DISPUTE RESOLUTION (1987) [hereinafter PUBLIC DISPUTES].

53. AMERICAN ARBITRATION ASSOCIATION, ALTERNATIVE DISPUTE RESOLUTION PROCEDURES: COMMERCIAL MEDIATION RULES (effective Sept. 1, 1984); and CONSTRUCTION INDUSTRY MEDIATION RULES (effective May 1, 1985). Reprinted in COULSON, BUSINESS ARBITRATION (3d ed. 1986).

54. STANDARDS, *supra* note 41, at Rule 10.

55. PUBLIC DISPUTES, *supra* note 52, at Rule 10.

56. *Id.*

57. *Id.* at Rules 12, 13.

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maintain confidentiality with regard to events transpiring in the mediation, and the rules do not allow stenographic records to be taken.⁵⁸

These rules serve as guidelines for mediators in the Program on ADR and could have a similar purpose for special masters for mediation. When a Program appointee is used as a special master for mediation, the intended goal is settlement through mediation.⁵⁹ Thus, the mediation rules, which were developed for mediation only, could be modified for use in the special mastering context. Such guidelines could then be incorporated into the order of reference.

b. Neighborhood Justice Center of Honolulu: Mediation Ethics.

The Neighborhood Justice Center of Honolulu (NJC) provides its volunteer mediators with a list of ethics and responsibilities to which they must adhere.⁶⁰ These rules include a fairly comprehensive list of twenty-four points which guide the mediator generally, as well as in some specific circumstances. In particular, the rules regarding confidentiality include an exception where child abuse is involved. Where criminal behavior will result in "drastic psychological or physical harm to another person, the mediator is obligated to report these actions to the appropriate agency."⁶¹ Absent these circumstances, a mediator must not reveal the contents of a mediation unless permission is granted by the parties.⁶² In addition, mediators must refuse to testify voluntarily in any subsequent court hearings and resist any subpoena of themselves or their files.⁶³

The NJC's rules also obligate a mediator to inform the parties when he or she feels an agreement is illegal or grossly inequitable to one or both of the parties.⁶⁴ When mediating under the auspices of an agency, such as the Family Court, mediators are to comply with that agency's policies and procedures because the mediator is essentially serving as that agency's

58. *Id.* at Rule 26.

59. *Id.*

60. NEIGHBORHOOD JUSTICE CENTER OF HONOLULU, INC., *MEDIATOR ETHICS AND RESPONSIBILITIES* (1986).

61. *Id.* at 11.

62. *Id.* at 12.

63. *Id.* at 13.

64. *Id.* at 16.

representative.⁶⁵ Hence, if the NJC were to be appointed as a special master for mediation by a specific court, that court's rules would apply.

D. Emerging and Potential Role of the Master as Mediator

Perhaps one of the first progressive uses of special masters was their appointment as facilitators of institutional reform.⁶⁶ Before this time, their role was geared towards writing reports on findings of fact and conclusions of law. Both the increase in the amount and complexity of litigation has made the use of judicial assistants, such as special masters, necessary to meet the requirements of pretrial management and overall case demands.⁶⁷ The cost of litigation has also increased, which has encouraged many parties to seek a faster and more efficient resolution of their disputes.

During the 1970's the role of special masters in federal cases expanded from a primarily fact finding mission into a more dynamic role. Courts first began to diverge from their standard role by appointing masters to carry out school desegregation and prison reform orders.⁶⁸ The use of these "institutional reform masters" placed monitoring, dispute resolution and enforcement functions onto one person affiliated with the courts.⁶⁹ After this expansive move, the special master's powers and role in settlement was increased. Now "they are taking the lead in settling enormous product-liability suits and other huge cases that threaten to paralyze the courts."⁷⁰

Enlarging the special master's role in settlement is particularly appropriate at present because of overburdened court dockets. Special masters are appointed by judges, and often by aggressive judges,⁷¹ to assist with cases.

65. *Id.* at 21.

66. Many of the earlier uses of special masters which were thought to be unusual included such a task as implementing court decrees. The special master's use of mediation as a method of settlement was not discussed, at least in the public forum, although assisting with the settlement of a dispute was the goal of implementing court orders. Noble, *Judicial Assistants and Adjuncts in New Jersey: Preliminary Background Research on Masters and Hearing Officers*, New Jersey Administrative Office of the Courts 40 (May 29, 1987) (Unpublished manuscript). See Kirp, *Judge and Company: Court Appointed Masters, School Desegregation and Institutional Reform*, 32 ALA. L. REV. 313 (1981).

67. Noble, *supra* note 66, at 40.

68. Barrett, *supra* note 2. See also Tractenberg, *supra* note 6, at 83.

69. Kirp, *supra* note 66, at 373-74.

70. *Id.*

71. *Id.*

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One of a judge's goals is to settle a case in the most efficient manner possible. The special master for mediation essentially expands upon the judge's role in conducting settlement conferences. However, because the settlement master is not a judge who must remain unbiased, the special master is less confined by strict rules of court. The special master for mediation is thus able to function as a less formal third-party neutral and can emphasize confidentiality while promoting agreement.⁷² Thus, the settlement master can elicit information that disputing parties would not be likely to disclose to a judge because of the judge's formidable stature and power.

III. SPECIAL MASTER AS MEDIATOR: OBJECTIVES AND PURPOSE

A. *Judicial Assistance*

1. *Complex Cases.*

According to Susskind, a special master might be especially useful where the judge feels constrained by the judicial process, in dealing with complex litigation cases, and when balancing technical issues and competing economic interests is difficult.⁷³ In this situation, a master with a particular area of expertise can help facilitate agreement between the parties. Susskind says that a judge might also use a master to assist in mediating solutions to a case in order to help resolve the case faster, especially where appeals would initiate further problems.⁷⁴

In complex cases, the special master for mediation can be used to narrow the number of issues that the court must consider. Complexity may be reduced if the mediator can get the parties to agree on the issues and facts.⁷⁵ This can succeed in both reducing costs by limiting the discovery process and, consequently, cutting the time the judge spends on the case.

In *Webster Eisenlohr v. Kalodner*,⁷⁶ the court appointed a master to assist in its determination of facts and its arrival at a "correct result" in a complex case. This directive indicates the court believed its resources and/or procedures were inadequate to deal with the case. Such a broad order

72. See generally Lewis, *The Special Master as Mediator*, 12 SETON HALL LEGIS. J. 75 (1988).

73. Susskind, *Court-Appointed Masters As Mediators*, 1 NEGOTIATION J. 295, 296 (1985).

74. *Id.*

75. *Id.*

76. *Webster Eisenlohr v. Kalodner*, 145 F.2d 316, 319 (3d Cir. 1944).

provides the special master with the discretion to determine the "correct result," and thus grants the master significant discretionary powers.

In complex cases, the special master appointed to mediate a case can facilitate negotiation in ways that may be considered unethical by a judge or a violation of due process. Settlement negotiations need to remain informal, secretive and dynamic, and are thus not suited to conventional forms of due process.⁷⁷ For example, a judge is limited by ethical constraints against prejudging the outcome.⁷⁸ The special master effectively insulates the judge from details of the negotiating process.⁷⁹ This allows the judge to preside over a jury-waived case and promote settlement between the parties without threatening his or her objectivity.

2. *Implementation of Judicial Decrees.*

As noted previously,⁸⁰ one of the first dynamic uses of special masters was to implement judicial decrees such as remedial plans and institutional reform. Two examples of these roles are school desegregation and prison reform.⁸¹ In one complex case dealing with school desegregation, the judge called on the special master to assist the court in coordinating and evaluating remedial proposals and to serve an investigatory and consultative function, thus allowing the court to approve an effective remedial order.⁸² The master was used in this case to "bridge the gap between the court as impartial arbiter of plans placed before it and the advocates protecting their clients' positions, that are often narrower than that of society at large."⁸³ The special master's role was to act as the neutral third party; in effect, the master acted as a mediator.

77. Schuck, *supra* note 4, at 362.

78. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 442 (1986).

79. *Id.*

80. See Part II.D.1, *supra*.

81. See, e.g., Berger, *Away From the Courthouse and Into the Field: the Odyssey of a Special Master*, 78 COL. L. REV. 707 (1978); *Reed v. Cleveland Bd. of Ed.*, 607 F.2d 737 (6th Cir. 1979).

82. *Hart v. Community School Bd.*, 383 F. Supp. 699, 765 (E.D.N.Y. 1974).

83. *Id.*

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3. *Other Uses.*

The special master as mediator can also be used to expand the parties' options for solutions, without which the parties would be at an impasse.⁸⁴ As a third-party neutral, the special master has the objectivity to create solutions the parties would otherwise overlook. The special master for mediation also has the ability to instill in the settlement process the benefits (and costs) that mediation normally provides. As with mediation generally, this can serve to help the parties maintain a working relationship, versus remaining at odds with each other.

B. Duty of Special Master for Mediation

1. Alleviation of Burdens: Who is the Settlement Master There to Help?

The settlement master is appointed by the court to help resolve a particular case and thus avoid trial. The benefits this appointment provides to the court are especially great because full discovery can be avoided, which is where much of the time and expense of a trial arises. The judge can focus on other matters, such as cases that may not be appropriately settled through mediation,⁸⁵ or when the parties refuse to participate in settlement negotiations.

More specifically, the duties of a master are equivalent to those of a judicial officer, and are generally bounded by the order of reference with which they are appointed.⁸⁶ The special master owes a duty to the parties as well as the courts to act reasonably in facilitating settlement. Inherent in this duty is the "exercise [of] firm discretion, to cause the business confided to him to be brought to a conclusion within reasonable bounds of time."⁸⁷

Cruz v. Hauck,⁸⁸ a 1975 case in which a master was appointed to make findings of fact and conclusions of law, discussed the history of F.R.C.P. 53 in detail. One issue the court addressed was whether litigants can waive the limitations on a master's use, as specified in F.R.C.P. 53(b), to allow the use of a master in their case. To answer this question, the court looked at

84. Susskind, *supra* note 73, at 297.

85. These cases involve emotional issues such as nuclear energy and abortion, where disagreements are based on deeply felt beliefs.

86. *In re Golbert*, 276 U.S. 6 (1928).

87. *Hart v. Community School Bd.*, 383 F. Supp. 699, 766 (E.D.N.Y. 1974). See also *Tractenberg*, *supra* note 6, at 93.

88. 515 F.2d 322, 329 (5th Cir. 1975).

the possible underlying policies limiting use of F.R.C.P. 53(b) -- either to protect a litigant, or to constitutionally require judges to sit in article III-type cases.⁸⁹ The court concluded that the policy behind F.R.C.P. 53 is "the alleviation of unnecessary burdens to litigants and the cornerstone of the rule is the avoidance of delay, costs, and [to provide] a fact finder other than a judge."⁹⁰ This policy defines some of the important goals of ADR, (*i.e.*, cost and time reduction and reduced involvement by the judge) and are appropriate for establishing the minimum level of duty of the special master for mediation.

Taking a different view, the Court in *La Buy v. Howes Leather Co.*,⁹¹ quoted a 1920 case⁹² which held that masters were to assist judges in performing specific judicial duties and were not to displace the court. In *La Buy*, the Court held that the order of reference requested by the plaintiff amounted to an abdication of the court's judicial function, and therefore deprived the parties of a trial before the court.⁹³ The Court used the constitutional right to trial as the reason to nullify the order of reference. It seems that in this case, the Court may have been overprotective of its power.

2. Article III, United States Constitution.

Article III of the United States Constitution provides that judicial power "shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of supreme and inferior Courts . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁹⁴ Article III judges were thus appointed to act at the federal level (including, for example, federal district court judges), and were protected from pressure that could be brought to bear by other branches of government. Although the thrust of Article III appears to be that only the courts are to exercise federal judicial powers, the valid exercise of this power by non-Article III judges remains an unresolved question.⁹⁵ There are also

89. *Id.* Art. III is further discussed in Part III.C.2, *infra*.

90. *Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975).

91. 352 U.S. 249 (1957).

92. *Ex parte Peterson*, 254 U.S. 300, 312 (1920).

93. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957).

94. U.S. CONST. art. III, § 1.

95. Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1304 (1975).

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questions as to whether similar constitutional issues could be raised at the state level, since early case law indicates "that states could establish courts not subject to the tenure and salary provisions of Article III and that those courts could adjudicate ordinary federal questions."⁹⁶ It is clear from the discussion above that special masters may or may not be a constitutionally valid tool for the courts. The author makes no attempt to answer this question. Because of the acceptance and use of special masters over the years, one generally assumes the courts consider their use valid.

3. *Negotiation and Rulemaking.*

When a judge decides a case, the decision is most often based on precedents established in earlier cases. According to settlement critic Owen Fiss, if cases are routed away from the adjudicatory system and more cases are resolved through a negotiation-based system such as settlement mastering, the development of the law will be stymied.⁹⁷ Fiss also argues that judges should make recorded court room decisions in order to make the parties feel bound by the judge's order. Menkel-Meadow, on the other hand, supports the theory that if parties formulate their own agreements, there is a greater likelihood that they will be followed.⁹⁸ Actual results, of course, depend on the good faith of the parties themselves, the degree to which the master manages the case and the parties' respect for the court's power to enforce the agreed settlement.

C. *Cost Reduction and Other Benefits*

The primary consequences of using special masters are cost reduction due to limited discovery, issue identification and clarification, and elimination of trials. The use of special masters can help to remedy the problem of overcrowded court dockets by directing settlement activities away from the judge. The judge can then deal with cases where settlement efforts are unlikely to work.

The use of special masters has not always been considered beneficial. In fact, after their initial overuse in the early 1900's, the use of masters was seriously curtailed because they increased the length of time to resolve a case, and therefore, increased court-related costs.⁹⁹ Today, while experienced

96. Note, *supra* note 19. See *Palmore v. U.S.*, 411 U.S. 389, 402 (1973).

97. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

98. Menkel-Meadow, *supra* note 7, at 26.

99. Noble, *supra* note 66, at 27.

special masters can charge a significant amount of money for their services, they also succeed in limiting the need for extensive discovery and significantly reducing the amount of time attorneys and judges must spend on a case. Thus, over the life of a case, overall costs are significantly reduced.¹⁰⁰

IV. FINDINGS

A. *Case Precedents*

Very little case precedent exists on which to establish a clear role and scope of power for the master as mediator. Two obvious reasons for this are: (1) cases settle prior to trial and thus are not publicly recorded, or (2) one of the parties objects to the use of a master or the recommendations for settlement, and hence discussion for the record (*i.e.*, on which to base rules), focuses solely on the issues concerning the objection. Several issues dealing with the use and power of special masters have been documented in case law. Although the rules established by these cases are from federal courts, and thus draw from the Federal Rules of Civil Procedure, many of the precedents established can be applied to state courts and may affect the powers which can legitimately be held by a settlement master for mediation.¹⁰¹

1. *The Order of Reference.*

Most courts have held that the scope of the master's powers should be specified in the order of reference.¹⁰² The order of reference is usually the key to the master's function and, by inference, power.¹⁰³ Case law has occasionally addressed issues relating to the scope of the master's authority in the order of reference. For example, in *Cold Metal Process Co. v. United Engineering and Foundry Co.*,¹⁰⁴ the plaintiffs brought a petition before the court to seek specific instructions for the master on the plaintiff's further proceedings. The court drew upon *Moore's Federal Practice*¹⁰⁵ to address the

100. See Barrett, *supra* note 2, and McGovern, *supra* note 78, at 467, 475, 492.

101. Hannah v. Plummer, 380 U.S. 460 (1965). See also Wheeler v. Shoemaker, 78 F.R.D. 218, 223 (1978).

102. See, e.g., United States v. Hardage, 733 F. Supp. 1425 (W.D. Okla. 1987); United States v. I.B.M., 66 F.R.D. 154 (S.D.N.Y. 1974).

103. See Tractenberg, *supra* note 6, at 90, 106.

104. 92 F. Supp. 969 (W.D. Pa. 1950).

105. J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 53.01 *et seq.* (2d ed. 1985).

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plaintiff's request, stating that the court does not generally dictate how the master should conduct proceedings as "such interference would tend to defeat the very purpose of reference."¹⁰⁶ Masters are to regulate the proceedings before them and take needed steps to perform the duties assigned them in the order of reference. If this discretion is abused, a party may go before the court for relief. Seeking relief, however, is not encouraged, and is granted only in extraordinary cases.¹⁰⁷

According to the court in *Webster Eisenlohr v. Kalodner*,¹⁰⁸ F.R.C.P. 53 does not specifically place any limitations on the scope of the master's commission. Limitations are made by imposing the "exceptional" circumstance on the case before the reference to a master under F.R.C.P. 53 is allowed. The court, in *Kalodner*, stated that the purpose of a reference was only to assist the court in identifying the facts and arriving at a correct result in a complicated case.¹⁰⁹ To the extent the master serves as an arm of the court, the master cannot have any greater power than the court; as the court is limited in addressing the issues brought before it, so must the master be limited.¹¹⁰ In *Chesa International, Ltd. v. Fashion Assoc.*, sanctions recommended by special masters were upheld as was the imposition of special mastering fees by a party whose obstructive conduct (in failing to comply with the master's directives) caused the master to spend more time on the case than would otherwise have been necessary.¹¹¹

Perhaps one of the most cited cases dealing with the issue of the special master's power is *La Buy v. Howes Leather Co.*¹¹² There the Court held that the appeals court was justified when it found that the order of reference was an abuse of the petitioner's power under F.R.C.P. 53(b), and that the abdication of judicial function deprived the parties of a trial before the court.¹¹³ The Court then stated that "the use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress

106. *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 92 F. Supp. 969, 971 (W.D. Pa. 1950).

107. *Id.*

108. 145 F.2d 316, 319 (3d Cir. 1944).

109. *Id.*

110. *Id.*

111. 425 F. Supp. 234 (S.D.N.Y. 1977). *See also* *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970).

112. 352 U.S. 249 (1957).

113. *Id.* at 255.

of a case."¹¹⁴ Neither calendar congestion, complex issues, nor the possibility of a lengthy trial were considered exceptional circumstances. Although this case has not been overruled, the rule that allows the use of special masters only in exceptional cases may be weakening and ripe for change.¹¹⁵ As more recent cases indicate, the term "exceptional circumstances" is not as strict as it may appear.¹¹⁶

2. *The Scope of the Special Masters Power.*

A recent case that found "exceptional circumstances" and called on special masters was *United States v. Conservation Chemical Co.*,¹¹⁷ where the need for a quick resolution of "serious claims alleging an imminent and substantial endangerment to the public health and welfare and to the environment" existed.¹¹⁸ The court looked to earlier cases¹¹⁹ when it allowed the reference of special masters.

In *Morgan v. Kerrigan*,¹²⁰ where appeals challenged the district court's orders implementing a desegregation plan for public schools, the court pointed out that the order of reference may specify or limit the master's powers, inferring that the reference did not require that the master's powers be limited. The order in this case specified that the special masters were "to conduct hearings and make recommendations for a desegregation plan for Boston public schools together with the reasons for recommending that plan, including discussion of key issues."¹²¹ The court went on to state that because the order did not involve findings of fact, it did not merit the deferential treatment provided in F.R.C.P. 53(e)(2). In non-jury actions, F.R.C.P. 53(e)(2) requires the court to defer to the master's findings unless they are

114. *Id.* at 256 (quoting *Ex parte Peterson*, 253 U.S. 300, 312 (1920)).

115. Explained in Part III.A.2, *infra*. See also *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 218 (1985); *United States v. Hardage* 733 F. Supp. 1424 (W.D. Okla. 1987).

116. *United States v. Conservation Chem. Co.*, 106 F.R.D. 210 (1985).

117. *Id.*

118. *Id.* at 218.

119. *Hart v. Community School Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974); *Gary W. v. Louisiana*, 601 F.2d 240 (5th Cir. 1979); and *Moore v. Leflore County Bd. of Election Comm'rs*, 361 F. Supp. 603 (D. Miss. 1972).

120. *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935.

121. *Id.* at 411, n.3.

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clearly erroneous.¹²² Hence the court in *Morgan* conceded that the master's report may not be automatically accepted. The court gave itself the discretion to accept or reject the master's recommendations. The special masters in *Morgan* served in an advisory role to the court, which allowed them broad powers. The ultimate effectiveness of the desegregation plan, however, was dependent upon the judge, because he had the final say on whether the recommended plan would be adopted.

In *Morgan*, the court determined that since masters and experts were subject to court control, and their assistance was needed by the courts, the masters should not be held to the strict standards of impartiality applied to judges.¹²³ This effectively gives masters the capacity to legitimately express their opinion and provide suggestions to the parties; in other words, to go outside the ethical boundaries of the judicial system without violating judicial conduct.

In *McGraw Edison Co. v. Central Transformer Corp.*,¹²⁴ the court directed the master "to define and simplify the issues in the case, to receive and report the evidence on behalf of the respective parties upon all of the issues, to make necessary computations, and to make findings of fact and conclusions of law upon all of the issues."¹²⁵ The master carried out his orders, recommending a specific judgment to the court. Objections to the master's recommendations were filed and the court stated that it was reluctant to overturn the master's findings when they were based on conflicting testimony of witnesses, whom the master had seen and heard.¹²⁶ Where such findings were based on logical inferences from documentary evidence, the court's reluctance decreased.¹²⁷ Hence, the master is likely to be given greater discretionary power when dealing directly with the parties and witnesses, and the court is more likely to uphold the master's findings and recommendations in such cases. Such would logically be the case with the special master for mediation.

Agent Orange litigation arose in the late 1970's and early 1980's. Because the issue involved was of great public interest, the media wanted access to unclassified and unconfidential documents produced during the discovery of

122. See, e.g., *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984). In this case the issue was whether the master's findings were final and unreviewable. Petitioner alleged the order to the special master was too vague. The court, noting that the master's functions were well defined in the consent judgment, held that the findings were unreviewable.

123. *Morgan v. Kerrigan*, 530 F.2d 401, 426-27 (1st Cir. 1976).

124. 196 F. Supp. 664 (D.C. Ark. 1961).

125. *Id.* at 666.

126. *Id.* at 667.

127. *Id.*

litigation that arose in certain district courts.¹²⁸ While assisting the court with settlement, the special masters issued a protective order precluding the dissemination of these documents. The protective order limited disclosure of the desired documents and was upheld by the court, indicating the master's broad authority allowed by the court.

In *United States v. IBM*,¹²⁹ the special master, again acting in a settlement role, was authorized to issue protective relief to preserve confidentiality of allegedly privileged documents and testimony offered as evidence.¹³⁰ The court again noted that the special master's recommendations "could be accepted or rejected by the court as appropriate or inappropriate, . . . subject to the standard of review contained in F.R.C.P. 53(e)(2)."¹³¹ The court is referring to the clearly erroneous standard on which to overturn a master's findings. In this case, the special master can only be overruled if the decision is clearly erroneous. Acting to promote settlement through mediation, it is unlikely the master would ever be overruled because the master can keep information confidential. The special master can keep information away from the judge by merely ruling that the information is confidential. The judge has little or no record on which to base a ruling on the master's findings.

In *Conservation Chemical*, the parties were unable to reach a settlement. The special master had participated in settlement discussions, including *ex parte* discussions, gaining extensive information not included in the record. The generator defendants challenged the continued participation of the master because the potential for prejudice existed.¹³² The court held that "[t]he bald assertion of bias, without citation to any specific instances of prejudicial conduct, is insufficient to require disqualification."¹³³

The parties could not remove the special master from the proceedings simply because they distrusted him, even though the special master would testify on the case. This decision could have an impact on the trust the parties give to the mediator, and provide a negative impression of mediation overall because the statements made in confidence could be threatened with exposure.

128. In re Agent Orange Product Liability Litigation, 96 F.R.D. 587 (1983).

129. 66 F.R.D. 154 (S.D.N.Y. 1974).

130. *Id.* at 156.

131. *Id.* at 159.

132. *United States v. Conservation Chem. Co.*, 104 F.R.D. 210, 234 (1985).

133. *Id.*

3. *Recent Developments.*

*Strandell v. Jackson County*¹³⁴ is perhaps the most recent case in which an alternative method of dispute resolution was challenged in the courts. The decision of the court of appeals could impact the future use of special masters for mediation.

The issue in *Strandell* was whether the trial judge could require a litigant to participate in a summary jury trial to promote settlement.¹³⁵ The *Strandell* case may affect special masters for settlement as well, since the court strongly urges the parties to use this method of ADR to facilitate settlement without a trial.¹³⁶ However, the court also noted that a district court has substantial inherent power to control and manage its docket. This power, the court stated, must be exercised in a manner that does not conflict with the Federal Rules of Civil Procedure.¹³⁷ Thus, "the U.S. Supreme Court and Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, [and] innovation by the individual judge must conform to that balance."¹³⁸

The district court, realizing its limitations, turned to F.R.C.P. 16(c) as its authority for a mandatory summary jury trial. The court held that F.R.C.P. 16 was not intended to force unwilling litigants out of litigation: "Rule 16 was not designed as a means for clubbing the parties into involuntary compromise."¹³⁹ The court concluded by stating that the use of mandatory summary jury trials, as a pretrial settlement procedure, would seriously impact established rules of discovery and work-product privilege.¹⁴⁰ This holding indicates that the use of special masters for mediation may be dependent upon the consent of the parties. Should any party object to the appointment of such a master, they may be able to call on *Strandell* for legal precedent.

134. 838 F.2d 884 (7th Cir. 1988).

135. *Id.*

136. *Id.* at 887.

137. *Id.* at 888.

138. *Id.* at 886-87.

139. *Id.* at 887 (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)).

140. *Id.* at 888.

B. Interview Results

Because of the lack of information available about special masters for mediation, the author interviewed special masters, judges, magistrates and others, to gain more in-depth knowledge about their powers and scope of authority.¹⁴¹ With two exceptions, all interviewees had law degrees. All but one had either acted as a special master at one time, or had a role in appointing special masters to settle cases. Survey questions focused on the issues of communication between the special master and judge, confidentiality, the power of the special master and the judge, and the order of reference appointing a special master for mediation.

1. Communication.

Most respondents agreed that the issue of communication between the special master and the judge depends on whether the issue is to be tried before a jury or a judge. If a case is to be tried before a jury, the level of communication can generally be more open. When tried before the judge, however, the level of communication should be very limited. The reason for this distinction is that the judge who tries a case is very likely to become biased by information received from the special master for mediation if substantive matters are discussed. It may be appropriate for the special master and the judge to discuss only administrative matters when the trial is jury-waived.¹⁴²

On the other hand, if trial is by jury, the jurors will make the decision on the case; thus, there would be fewer reasons to insulate the judge from

141. Interview with Peter Adler, Director, Program on ADR, Haw. State Judiciary, in Honolulu, Haw. (May 18, 1988); telephone interview with Mag. Wayne Brazil, United States District Court, N.D. Cal., San Francisco, Cal. (Mar. 17, 1988); telephone interview with Jack Cooley, Attorney, Chicago, Ill. (Mar. 25, 1988); telephone interview with Thomas A. Fee, Assistant Deputy Public Advocate, Attorney/Mediator, N.J. Dept. of the Public Advocate, Trenton, N.J. (April 11, 1988); telephone interview with Professor Stephen Goldberg, Northwestern University School of Law, Chicago, Ill. (Mar. 24, 1988); telephone interview with Professor Eric Green, Boston University School of Law, Boston, Mass. (Mar. 17, 1988); interview with Judge Robert Klein, First Circuit, State of Hawaii, in Honolulu, Haw. (May 6, 1988); telephone interview with Michael Lewis, Deputy Director, National Institute of Dispute Resolution, Washington, D.C. (Apr. 28, 1988); telephone interview with Professor Francis McGovern, University of Alabama School of Law, Tuscaloosa, Ala. (Apr. 26, 1988); telephone interview with James McGuire, Mediator, N.J. Dept. of the Public Advocate, Trenton, N.J. (Apr. 18, 1988); interview with Judge Ronald Moon, First Circuit, State of Hawaii, in Honolulu, Haw. (March 16, 1988); telephone interview with Raymond Noble, Administrative Office of the Courts, Trenton, N.J. (Apr. 14, 1988); interview with Justice Frank Padgett, Hawaii Supreme Court, in Honolulu, Haw. (Mar. 21, 1988); telephone interview with Professor Paul Rice, The American University, Washington College of Law, Washington, D.C. (Mar. 24, 1988).

142. Adler & Cooley, *supra* note 141.

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discussing settlement matters with the special master.¹⁴³ This line of reasoning is consistent with court rules that preclude settlement judges from deciding cases in which they have participated in settlement discussions. Although many of the interviewees generally agreed with this concept, there were significant differences among them regarding the specific level of communication that is ethical. Several of the interviewees did not believe any substantive communication was proper even in jury trial cases.¹⁴⁴

Professor Cooley suggested that with very limited exceptions, there should be no communication between the judge and special master -- regardless of whether it is a jury or jury-waived trial. This is because special masters are often called on to relieve judges of problems associated with a case, thus purposefully seeking to avoid non-evidentiary information.¹⁴⁵ Verbal communication between the two can also influence a mediation by making the parties feel uneasy about the special master.¹⁴⁶ To be effective in settlement, the parties must have complete trust in the special master. Any reservations by the parties could seriously stifle settlement efforts.

Magistrate Brazil pointed out that there are very few advantages to giving the judge information about the substance or impressions of a special master's mediation.¹⁴⁷ There is a risk that the judge will be influenced, or perceived as being influenced, by material that the judge would not hear in trial.¹⁴⁸ There is also the possibility that parties could be pressured by the judge in the use of slanted jury instructions.¹⁴⁹ Also, if the judge has access to the special master's information about the mediation, the judge may act with only partial knowledge about the case.¹⁵⁰ For instance, if the special master provided the judge with a subjective opinion on a certain issue, the judge may base the decision on this potentially unreliable information. Whether or not the case was tried by a jury would not impact this line of reasoning, because the judge could influence the outcome of the case through jury instructions.

An example of the problem associated with increased communication was noted by one of the special masters interviewed. The judge made it clear

143. Adler, McGovern, & Moon, *supra* note 141.

144. Cooley, Brazil, Goldberg & Padgett, *supra* note 141.

145. Cooley, *supra* note 141.

146. *Id.*

147. Brazil, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.*

from the start that he wanted greater communication.¹⁵¹ Although the special master in this case¹⁵² was not pleased with the situation, it was agreed that the level of communication would be increased. Although this was a jury case, the special master felt that once communication was opened to such a great extent, it would be hard to determine the point at which it should be curtailed. The master felt this was generally true for all communication between master and judge.

One difficulty in trying to define the proper level of communication in the master-as-mediator situation is that the master is trying to play two conflicting roles. One role, the more traditional one, is as the judge's right arm -- assisting the judge by conducting a variety of judicial tasks such as making findings of facts and conclusions of law. The other, newer role is as special master for mediation. The special master for mediation would function both physically and procedurally at a greater distance from the judge. Thus communication would be limited. The conflict between these roles is intensified because judges have traditionally been engaged in settlement activity themselves, and the distinction between their role and that of the special master is easily blurred when they both act to facilitate settlement.

Almost all respondents agreed that the issue of communication must be addressed at the time the court first refers the case to the master -- most appropriately in the order of reference. Because the proper level of communication is a fundamental matter in the overall settlement procedure, it should be clarified prior to any mediation efforts. If not clear from the start, conflicts between the master, judge and parties are likely to arise.

2. Confidentiality.

In order to make the special master for mediation a person whom the parties can trust and confide in, confidentiality is necessary. This is a basic, essential fact of all mediation. The interviewees differed on the proper level of confidentiality and the degree to which it should be maintained; however, when posed with the question of whether the judge should be provided with information given to the master in confidence, there was a definite consensus of opinion.

All respondents agreed that if the special master specifically agrees to hold certain information in confidence, the master should not disclose this information to the judge, regardless of any potential reason. This, of course, does not preclude the master from exploring possible disclosure by first gaining permission from the parties themselves. Michael Lewis, Deputy

151. See generally Adler *et al.*, *supra* note 141.

152. The name of the special master is withheld by request.

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Director of NIDR, believes that a settlement master must not tell the judge when a certain party is causing problems in the mediation.¹⁵³ However, if a party fails to appear, Lewis felt the master should be able to do whatever was necessary to get that party to attend -- such as reporting the absence to the judge.¹⁵⁴ If the special master takes on a role in addition to settlement (for instance fact finding), then the issue of confidentiality could be treated more flexibly because the "other role" may not require the strict confidentiality that some feel is needed in mediation.¹⁵⁵

Peter Adler and Michael Lewis suggested that the same principles that operate in mediation should apply to special masters as mediators.¹⁵⁶ If a master functions only to promote settlement, there should be no disclosure to the judge, even at the judge's request. All interviewees agreed that any such disclosure may create ethical problems for the special master, as well as the judge.

Magistrate Brazil felt there is no reason to report to the judge in a settlement situation, and that disclosure of confidential information probably is not beneficial to settlement efforts in any case.¹⁵⁷ In fact, such disclosure threatens the integrity of the entire settlement process as well as the parties' confidence, according to Brazil.¹⁵⁸ He stresses that it is important to make the ultimate product fair.¹⁵⁹

With the parties' concurrence, Professor Jack Cooley once informed a judge of the resolution the parties had reached, in order for the judge to say whether he thought it was fair and adequate.¹⁶⁰ Once the judge's opinion was known, the parties settled immediately. Cooley suggested that before giving settlement information to the judge, there should be good reason.¹⁶¹ He noted that when a judge requests confidential information and the parties object, the parties themselves should go before the judge to express their objections.¹⁶²

153. Lewis, *supra* note 141.

154. *Id.*

155. Adler & Green concurred, *supra* note 141.

156. *Id.*

157. Brazil, *supra* note 141.

158. *Id.*

159. *Id.*

160. Cooley, *supra* note 141.

161. *Id.*

162. *Id.*

If this occurs, however, the mediation effort no longer exists as such. The special master is removed from the proceeding and the situation thus becomes adjudication.

When mediation by special masters takes place, judges should resist their natural desire to be informed of everything that takes place, according to Professor Eric Green. The judge must not promise to honor the parties' desire for confidentiality and then proceed to seek just such information himself at a future time. Although it is necessary to keep the judge informed when the judge's involvement is required, such as in complex cases, Green would not inform a judge of anything that the judge might "mess up."¹⁶³

Here again, the interviewees concurred that the level of confidentiality must be identified when the reference to the special master was made. This issue, they generally agreed, should be decided with the input of the parties in order to be completely legitimate. In any event, any confidential information revealed during the settlement efforts would be governed by Hawaii Rule of Evidence 408,¹⁶⁴ which prohibits revealing such information.

3. Power.

The powers of the special master and the judge must be balanced. While the focus of the interview questions was on the special master's power, his power is understandably controlled by the courts. It is the judge that appoints the special master, assigns the job, and hands over the authority. Because the role of special master for mediation is in a dynamic state, the power inherent in his appointment is unclear. By asking the interviewees for their views on this topic, some clarification was gained. However, most replied that the power of the special master as mediator must be clearly delineated in the reference and varies from case to case.

The role of mediator normally calls for a large degree of discretion in dealing with the parties.¹⁶⁵ In the role of special master, as one interviewee put it, the mediator is primarily guided by rules of prudence.¹⁶⁶ Most of the persons interviewed agreed that a general order of reference was preferable to an overly specific one. A general order of reference, two interviewees noted, requires strong support and confidence from the court.¹⁶⁷ A general

163. Green, *supra* note 141.

164. HAW. R. EVID. 408: Compromise and Offers to Compromise. This rule is identical to the FED. R. EVID. 408.

165. This has been stressed throughout this Article, particularly in Part II.C.

166. Goldberg, *supra* note 141.

167. Green & Klein, *supra* note 141.

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order, which provides greater overall flexibility, also allows special masters to use their own style. *Ex parte* communication with the parties, usually essential to mediation, was also seen as an appropriate and essential power for special masters for mediation.¹⁶⁸ There was also general agreement that special masters for mediation should be able to fix the time and place for negotiations and to order the parties to participate.¹⁶⁹ All respondents agreed that the power to sanction and the power to order motions was more appropriately left to the judge. Michael Lewis pointed out that sanctioning is inherently a public power, which alters the private mediation situation in which the special master participates.¹⁷⁰ He felt the master cannot and should not have both powers.¹⁷¹ Judge Klein agrees -- the power to sanction revokes the agreement to mediate.¹⁷²

Peter Adler suggested that the special master should have some authority to compel production of certain materials, as well as the power to compel meetings.¹⁷³ Adler described a theoretical sliding scale of powers for the special master, from more to less coercive, depending on the requirements of the case and the judge. At the higher end of the scale may be something just short of arbitration, including the ability to compel discovery.¹⁷⁴

Professor Paul Rice believed that the master as mediator has no inherent power, only that which is granted in the order of reference.¹⁷⁵ However, references for the cases on which he has worked have provided for very broad powers. In these cases, the mediators structured the whole process, including evidentiary rulings.¹⁷⁶ Parties were able to appeal by going to the court for a reversal of the special master's actions.

Perhaps the most critical question relative to a special master's power in settlement is whether the judge retains ultimate decision-making power over

168. There was general agreement on the issue of *ex parte* communication.

169. As noted previously, there is also clear agreement that if the parties are not participating in the negotiations willingly, it is unlikely that a settlement can be reached.

170. Lewis, *supra* note 141.

171. *Id.*

172. Klein, *supra* note 141.

173. Adler, *supra* note 141.

174. *Id.*

175. Rice, *supra* note 141.

176. *Id.*

the master. A clear majority of those interviewed¹⁷⁷ believed that the judge retains ultimate power, at least in specific circumstances. The majority also agreed that the judge's powers applied primarily to administrative matters. Most interviewees noted that the master is the functionary of the judge; therefore, the special master is appointed to act at the will of the judge. It was the opinion of these interviewees that the judge does not have the power to override the special master on issues of confidentiality. However, if the judge had the parties' consent, the interviewees would approve the judge's ruling.

Those who disagreed with this perspective on ultimate power did so primarily because of the issue of confidentiality. Justice Frank Padgett emphasized that the public has great distrust of the judicial system.¹⁷⁸ If the judge is given overriding power, the parties will not be able to have complete trust in the mediator. He stressed that the parties could not depend on the mediator to hold anything in confidence if the judge were able to order confidential information from the master.¹⁷⁹

4. *Settlement and Discovery.*

Problems can arise when a master, acting as mediator, becomes involved in discovery. Approximately half of those interviewed had reservations about combining these two roles.¹⁸⁰ They stated that special masters for mediation should concentrate on using information received through the mediation process and should not have the power to compel discovery.¹⁸¹ Relevant information should surface through the mediation process, hence the special master should have no need to conduct discovery. The discovery role would detract from the master's neutrality just as it would from the judge's.¹⁸² Since discovery is part of the adversarial process, it is the attorney's job to deal with discovery and provide relevant information to the master.¹⁸³

177. Nine out of thirteen interviewees stated that the judge has overriding power, with one interviewee declining to answer.

178. Padgett, *supra* note 141.

179. *Id.*

180. Brazil, Goldberg, Klein, Rice & Padgett, *supra* note 141.

181. Rice, *supra* note 141.

182. Klein, *supra* note 141.

183. *Id.*

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The other interviewees¹⁸⁴ felt that if it was efficient for the special master to conduct discovery, then it should be allowed. Fact intensive cases may call for such efficiency.¹⁸⁵ In many cases, special masters for settlement have had some control over discovery. The parties should be able to decide whether discovery will be part of the master's duties and what will be done with the information obtained.¹⁸⁶

The consensus of those interviewed was that in all cases the settlement master's discovery-related activities should be specified in the order of reference. The order of reference should also state whether certain discovery information can be disclosed to the judge. In a non-jury trial there is a greater danger of exposing the judge to discovery information as this may bias the judge's perception of the case.

5. *Reference to the Master.*

All interviewees agreed that the contents of the order of reference to the special master for mediation was critical. It should be comprehensive, addressing at a minimum communication, confidentiality, power, settlement and discovery. The order of reference should also detail the scope of work the master is to perform, as called for by F.R.C.P. 53.

V. CONCLUSION

A. *Confidentiality*

Confidentiality is perhaps the most crucial issue in identifying the role of the special master for mediation. Deciphering precisely what the level of confidentiality should be in a given circumstance between the special master, the judge and the parties is difficult. Undoubtedly this is why some interviewees felt that all communication relating to mediation should be prohibited. The special master as mediator must consider many aspects of a case before deciding whether confidential information should be exposed. First, consideration must be given to the specifics of the order of reference. Because all parties to the mediation have the duty to be aware of what the

184. McGovern, Green, Cooley, & Adler, *supra* note 141.

185. Adler, *supra* note 141.

186. Cooley, *supra* note 141.

reference contains, a reference that specifically addresses confidentiality should govern the master's conduct on the issue.¹⁸⁷

If confidentiality is not addressed in the reference, a master must use discretion to evaluate what is best for the parties and the case as a whole, and then balance the two interests if a conflict exists. All interviewees would no doubt agree that a master should not disclose anything that has been previously agreed to be kept in confidence unless all parties are granted the opportunity to express their objections to the court. Thus, even though a settlement master is appointed to act on behalf of the court as an arm of the judge, the special master's duty of confidentiality lies first, as with all mediators, with the parties. The special master's promise of confidentiality should be maintained even if the master thinks revealing confidential information would help settle the case and even if the judge requests such information.

When dealing with either a jury or jury-waived trial, judges must realize their place in settlement after they have appointed a special master to take over. Judges must not try to dictate exactly how the master is to handle mediation or settlement negotiations. They should not feel the need to know about every aspect of the settlement as it progresses or falters. By appointing a master for settlement, a judge, to a large extent, removes himself from settlement aspects of case handling. Administrative matters may be all that can legitimately be communicated without risking the parties' loss of trust in the mediator. Included as administrative matters would be communicating with the judge when a party does not attend a settlement meeting. In such cases, the mediator might suggest that the judge sanction the uncooperative party.

Mediation generally requires separate meetings with disputing parties to provide a forum where the parties can disclose their true feelings and thoughts on certain issues. It is often at this stage, the caucus, where the mediator discovers a party's true concerns, or hidden agendas. Settling a case through mediation requires the use of *ex parte* meetings, not only for acquiring information, but also for gaining the parties' trust. Settlement negotiations need to remain informal, secretive, and dynamic, and are thus not suited to conventional forms of due process¹⁸⁸ with which *ex parte* communication may interfere.¹⁸⁹

Ex parte communication between the master and judge is a more significant issue. The contents of such communication, should it take place, must be limited primarily to administrative matters of the specific case. This

187. See generally Adler, *supra* note 141.

188. Schuck, *supra* note 4, at 362.

189. See Tractenberg, *supra* note 6, at 91-92.

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type of communication must be well defined in the order of reference to give the parties a clear idea of what the judge and master will discuss in their absence, thus allowing the parties to maintain a certain degree of trust in the special master and the mediation process.

B. Overall Power of The Settlement Master

1. Scope of Power.

Special masters for mediation are appointed by courts to assist with settling a case. The fact that they are court-appointed is primarily what distinguishes other mediators from special masters for mediation. Judges will often appoint special masters specifically to remove themselves from settlement aspects of a case, especially if the judge will preside at trial if settlement fails. This reduces the judge's risk of becoming tainted with settlement information, which may bias the judge's later decision on the case. By asking for such assistance, the judge has waived some of the powers inherent in his position. Selected settlement powers are passed to the special master and the special master remains until the case is settled or one of the parties objects.

The powers adopted by the special master as mediator should be limited to settlement unless otherwise specified in the reference and agreed to by the parties. While the master should clearly be able to impose on the parties the time and place for settlement negotiations, the master should not have the power to impose sanctions or initiate motions. It is the judge who should maintain ultimate control over the judicial process. This is not to say that the master should be prohibited from approaching the judge to recommend sanctioning of a certain party, or to recommend that a particular motion would facilitate settlement. The master needs to gain enough power to instill respect in the parties, while also maintaining a high level of trust.

2. Limits on Discovery Powers.

In their role as settlement masters, special masters need to have adequate information about a case to understand what is alleged to be in dispute. During the settlement process masters receive further information from the parties themselves, both about their involvement in the dispute and the circumstances that caused the suit to arise. Although this information is not the result of a formal discovery process, new and important information will often be presented. This may impact established rules of discovery and work-product privilege.¹⁹⁰ For instance, in *Strandell v. Jackson County*,¹⁹¹

190. 838 F.2d 884 (1988). See Part IV.A.3., *supra*.

the court held that a nonbinding summary jury trial could not be imposed on the parties by the federal district court.¹⁹² The plaintiffs opposed having forced participation in the mock trial, because previously uncovered discovery information would be exposed to the opposing party.¹⁹³ Some ADR methods, such as special masters for mediation, could be affected by this rule, should any of the parties have serious doubts about the process.

C. Issues to Consider

1. Jury v. Jury-Waived Trials.

The interview results indicate that although there is not complete agreement on the subject, a deeper level of communication could take place between the special master as mediator and the judge when the case is to go before a jury trial. However, several interviewees strongly urged that communication be very limited in both jury and jury-waived cases.

In Schuck's article on the Agent Orange case,¹⁹⁴ he discusses the risk of procedural unfairness due to judicial overreaching. During the Agent Orange negotiations, *ex parte* communications passed between the judge and special masters and attorneys.¹⁹⁵ Schuck states that "[w]hether or not this procedure violated Canon 3 of the Code of Judicial Conduct, it clearly merits concern."¹⁹⁶

2. Informality.

Adjudication is necessarily a much more formal process than mediation. Settlement discussions can be less formal because it is the parties, not the court, who are deciding the outcome; the public at large should not be significantly affected by their decision. In adjudication, the judge, or in some cases a special master or arbitrator, makes a decision based on legal foundations. In settlement, however, it is important for special masters to be able to act relatively informally, in order to maintain the parties' confidence. This informality often allows time and money expenditures to

191. 838 F.2d 884 (1988).

192. *Id.* at 888.

193. *Id.* at 887.

194. Schuck, *supra* note 4, at 362.

195. *Id.* at 363.

196. *Id.*

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be drastically decreased, which makes the court mediation and settlement process more attractive to the disputants.

3. *Discretion.*

As Brazil has noted, the best orders of reference are phrased in generalities.¹⁹⁷ The special master will come to know a case more intimately than the judge and will need to tailor procedures to specific case needs. This requires the freedom to act quickly and informally. Ultimately, of course, the special master's discretion must be trusted by the parties as well as by the judge.¹⁹⁸

4. *Special Masters: Knowledge.*

Special masters in legal settlements must have a certain working knowledge of the law to be effective. However, special masters do not need to have a law degree to gain this understanding. There was general agreement among the interviewees that some power of authority is necessary to be truly effective. A law degree is one avenue that can instill such authority, but experience and expertise in specific areas can be equally as effective.

When identifying potential interviewees, all persons most knowledgeable about special masters as mediators were men. This raises the question of a woman's place in the special master's role. Are men more authoritative figures, whom the parties will respect? Perhaps women as special masters are not conceived of as holding enough power to maintain the required degree of control over the parties. In any event, this is an important issue, and an issue that may evolve as the use of special masters increases.

D. *The Need for Guidelines for Special Masters as Mediators*

1. *What Questions Should Be Addressed Before Mediation Begins?*

The depth of the questioning is very likely to be dependent on the nature of the judge -- whether passive or managerial. A managerial judge may tend to give the special master broader authority, thereby promoting efficient use of the judge's time. A passive judge might restrict the special master's

197. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. CHI. L. REV. 394, 417-21 (1986).

198. *Id.* See also Kaufman, *Use of Special Pre-Trial Masters in the "Big" Case*, 23 F.R.D. 572 (1958).

authority to more traditional levels.¹⁹⁹ Because managerial judges strive for efficiency, they tend to give special masters greater authority to settle a case. Passive judges are generally less willing to take risks associated with granting broad powers to a master.²⁰⁰

For the benefit of all involved, questions regarding settlement procedures must be resolved before a mediation begins, preferably in the order of reference. The order of reference is an established tool, ready to incorporate a variety of information, as called for by the special master, the judge and the disputants. Perhaps the first issue to address in the reference is the level of communication between the disputing parties, the master, and the judge. Developing a checklist of issues that should be addressed in every order of reference would be beneficial because it would help avoid potential disputes during the mediation process.

2. *Guidelines for Constructing an Order of Reference.*

The order of reference, whether constructed according to federal or state rules, is a critically important document. It should identify the special master's assignment, as well as the special master's role. For the special master to manage a relatively smooth mediation and settlement process, a certain degree of specificity is necessary, although this may conflict with the special master's need to remain flexible and adaptable.

An outline of topics, which should be covered in the order of reference, would provide all participants with the opportunity to identify critical areas of concern.²⁰¹ The parties play the deciding role in settlement, and therefore, should be included in developing the order of reference along with the special master and judge. Although this may lengthen the reference process, the potential for confusion during and after the mediation would be decreased. It is also important for the parties to know the role of the special master.

In defining the special master's role, the master's power should be clearly identified. All parties must know the master's bounds of power. For example, whether the special master can order discovery and sanctions may influence the entire process. Parties must have a healthy respect for the master's role; understanding the power of the special master would increase that respect.

199. 23 F.R.D. 572 (1958).

200. See Resnik, *supra* note 10.

201. *Id.*

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3. *Ethical Considerations.*

The special master for mediation must abide by certain ethical rules. Perhaps the most appropriate would be those rules that guide mediators.²⁰² If ethical rules for attorneys or judges are applied, this may overly constrain the special master in mediation. Such rules may provide too much ammunition to a party fighting a settled dispute that, as time revealed, worked to their disadvantage. A mediator's liability must be protected or the mediation process will become dysfunctional.

E. *A Standard Authority to Guide Special Masters as Mediators*

A special master as mediator can function most effectively when given broad authority. With broad authority, the special master makes most decisions according to discretion. However, if no bounds on the special master's authority are established, the court may subsequently find that it has relinquished more control over case management than expected, constitutional questions notwithstanding. As a result of establishing standards that identify the scope of the powers and responsibilities of the special master for mediation, orders of reference may become more technical.

1. *The Power Balance.*

To operate effectively, the special master must earn the respect and trust of the parties. This respect can be earned if the special master has enough authority to be taken seriously, thus requiring a certain amount of power and control over the proceedings. The special master should, at the very least, have the authority to establish mediation procedures and dictate the time and place for meetings. Should any of the parties fail to attend a negotiation or settlement meeting, the master must be able to approach the judge to recommend sanctions. Generally speaking however, the special master should not communicate to the judge about a particular party's actions within the mediation. The risk of creating undue bias in the judge is too great.

The power a special master as mediator adopts through court appointment must be limited for the practical, ethical and constitutional reasons enumerated throughout this Article. Although the authority of a settlement master should generally be broad, the master must not invade areas for which the court is solely responsible. Thus special masters for mediation should not adopt the power to invoke sanctions or order motions. A healthy balance must be maintained, weighing in favor of the court when constitutional questions are raised.

202. See Lewis, *supra* note 72, at 79; Tractenberg, *supra* note 6, at 106.

The court should retain the bulk of administrative power and the special master should retain substantive power over settlement. This means that the court should not have the power to dictate how the special master for mediation approaches a case, unless of course, there are ethical problems involved. When a master is appointed to act as mediator, the court is calling for significant assistance with the dispute and is effectively handing many settlement duties over to the special master. A special master for mediation should not be appointed unless the court is willing to place its trust in, and give support to, the decisions of the special master.

2. *Communication and Confidentiality.*

Communication between the special master as mediator and the judge must be specifically defined and clearly understood by all the parties before mediation begins. This topic may be appropriately included in the order of reference. Whether a case is to be tried by a judge or jury will influence the degree of communication with which the parties feel comfortable. In all cases, it is best if communication is limited, in order to maintain the good faith of the disputing parties. The special master's scope of authority is paramount. The judge must not demand information from the special master and the special master should limit communication with the judge to administrative matters.²⁰³ Few advantages are gained when the special master provides information on the substance or impressions of the mediation. Substantive *ex parte* communication should never occur between the judge and the special master unless the parties are notified.

Confidentiality is controlled by the level of communication maintained between the special master and the judge. When communication is restricted, there is less likelihood of breaking a commitment of confidentiality, and thus hampering effective mediation.

3. *Settlement and Discovery.*

Special masters for mediation should focus their efforts on mediation and settlement. If obtaining specific documents would be particularly useful to settlement efforts, they should have the authority to obtain them. This should be a rare occurrence however, since the primary source of the special master's information should be the parties themselves.

A special master for mediation should have the authority to compel the parties to produce specific, critical information. This adds a certain degree of pressure to the mediation setting, and is part of the special master's overall control of the mediation process. However, a special master must not obtain

203. STANDARDS, *supra* note 41.

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information from one party to give the other party, for obvious ethical reasons.

F. Postscript

The special master for mediation has the potential to make the settlement of disputes within the court system a highly dynamic and efficient process, while concurrently saving the parties time, money and heartache. Several courts around the country are incorporating special masters for mediation in permanent or experimental programs. As this Article indicates, the use of special masters appears to bode well for the future of our adjudicatory system of justice. There will undoubtedly be impacts from the use of special masters for mediation that we cannot yet forecast. Their use must be monitored and evaluated to identify the positive and negative aspects of their use over the years and to gain a clear understanding of how they impact the judicial system.

